

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

PETER DANIEL BOMMERITO, JR.,

Petitioner,

No. C 05-2341 PJH (PR)

vs.

**ORDER DENYING  
PETITION FOR WRIT OF  
HABEAS CORPUS**

JILL BROWN, Warden,

Respondent.

This is a habeas corpus case filed by a state prisoner pursuant to 28 U.S.C. § 2254 challenging a denial of parole. The court ordered respondent to show cause why the writ should not be granted. Respondent filed a motion to dismiss all claims. The court granted the motion in part, dismissing one of petitioner's ex post facto claims, but denied the motion as to the remaining claims. Respondent filed an answer and a memorandum of points and authorities in support of it, and lodged exhibits with the court, and petitioner has filed a traverse. For the reasons set forth below, the petition will be denied.

**BACKGROUND**

On December 15, 1973, petitioner shot Larry Starks, on March 23, 1974, he shot Henry Lee Cowart, and the next day he shot Alfred Redwood. Starks and Redwood survived the shootings, but Cowart was killed. All three were African American men whom petitioner had seen with white women. In 1975, a jury in Los Angeles County Superior Court found petitioner guilty of one count of first-degree murder, Cal. Penal Code § 187, and two counts of assault with a deadly weapon, Cal. Penal Code § 245(a). The trial court sentenced him to a term of life in prison plus seven years. On February 23, 2003, after a hearing before the Board of Prison Terms (now the Board of Parole Hearings, or "Board"),

1 during which he was given an opportunity to be heard, the Board found him unsuitable for  
2 parole. Resp. ex. 3 at 65. The Board based its decision upon the "especially cruel manner  
3 with a disregard for human suffering" in which he committed the offense, the multiple  
4 victims of the crimes, the motive for the crimes being "hate," an unstable social history of  
5 alcohol and drug use, prior criminality including time on adult probation and in jail, three  
6 violence-related disciplinary violations while incarcerated, "general" parole plans, and the  
7 need for him to maintain his gains over a longer period of time. *Id.* at 65-68.

## 8 DISCUSSION

### 9 I. Standard of Review

10 A district court may not grant a petition challenging a state court decision on the  
11 basis of a claim that was reviewed on the merits in state court unless the state court's  
12 adjudication of the claim: "(1) resulted in a decision that was contrary to, or involved an  
13 unreasonable application of, clearly established Federal law, as determined by the  
14 Supreme Court of the United States; or (2) resulted in a decision that was based on an  
15 unreasonable determination of the facts in light of the evidence presented in the State court  
16 proceeding." 28 U.S.C. § 2254(d). The first prong applies both to questions of law and to  
17 mixed questions of law and fact, *Williams (Terry) v. Taylor*, 529 U.S. 362, 407-09 (2000),  
18 while the second prong applies to decisions based on factual determinations, *Miller-El v.*  
19 *Cockrell*, 537 U.S. 322, 340 (2003).

20 A state court decision is "contrary to" Supreme Court authority, that is, falls under  
21 the first clause of § 2254(d)(1), only if "the state court arrives at a conclusion opposite to  
22 that reached by [the Supreme] Court on a question of law or if the state court decides a  
23 case differently than [the Supreme] Court has on a set of materially indistinguishable facts."  
24 *Williams (Terry)*, 529 U.S. at 412-13. A state court decision is an "unreasonable  
25 application of" Supreme Court authority, falls under the second clause of § 2254(d)(1), if it  
26 correctly identifies the governing legal principle from the Supreme Court's decisions but  
27 "unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413. The  
28 federal court on habeas review may not issue the writ "simply because that court concludes

1 in its independent judgment that the relevant state-court decision applied clearly  
2 established federal law erroneously or incorrectly." *Id.* at 411. Rather, the application must  
3 be "objectively unreasonable" to support granting the writ. *See id.* at 409.

4 "Factual determinations by state courts are presumed correct absent clear and  
5 convincing evidence to the contrary." *Miller-El*, 537 U.S. at 340. A petitioner must present  
6 clear and convincing evidence to overcome § 2254(e)(1)'s presumption of correctness;  
7 conclusory assertions will not do. *Id.*

8 Under 28 U.S.C. § 2254(d)(2), a state court decision "based on a factual  
9 determination will not be overturned on factual grounds unless objectively unreasonable in  
10 light of the evidence presented in the state-court proceeding." *Miller-El*, 537 U.S. at 340;  
11 *see also Torres v. Prunty*, 223 F.3d 1103, 1107 (9th Cir. 2000).

12 When there is no reasoned opinion from the highest state court to consider the  
13 petitioner's claims, the court looks to the last reasoned opinion. *See Ylst v. Nunnemaker*,  
14 501 U.S. 797, 801-06 (1991); *Shackleford v. Hubbard*, 234 F.3d 1072, 1079, n. 2 (9th  
15 Cir.2000).

## 16 **II. Issues Presented**

17 Petitioner's issues are somewhat unclear, unsurprisingly for a layperson dealing with  
18 a complex area of law. The court tried to set them out concisely in the order to show  
19 cause, where it listed his claims as follows: (1) as California's "hate crime" statute was not  
20 in effect until 1992, approximately eighteen years after his conviction, the Board violated his  
21 ex post facto rights by citing the apparent "hate" motive for the commitment offenses as a  
22 reason for denying parole; (2) the denial of parole violated due process in that no evidence  
23 supported it; (3) his due process rights were violated in that parole was denied on the basis  
24 of "facts" which were untrue; (4) the denial of parole violated his due process and ex post  
25 facto rights because a counselor based her report that there was an "unpredictably high"  
26 danger that petitioner would reoffend on the counselor's opinion that one cannot predict if a  
27 person will reoffend; (5) the parole board's basing its decision in part on petitioner's lack of  
28 firm offers of employment, lack of a place to live, and "vague" parole plans, violated

petitioner's ex post facto rights; and (6) the state courts' failure to require compliance with state law was "egregious."

Issue six was dismissed in the order to show cause. In ruling on a subsequent motion to dismiss, this court dismissed the claim that the Board violated the Ex Post Facto Clause by applying parole consideration factors that came into effect under the Indeterminate Sentencing Law, which was passed long after his conviction and sentence under California's prior sentencing scheme, the Determinate Sentencing Law. The dismissal of this ex post facto argument effectively dismissed the claims petitioner raises in the fifth claim and the ex post facto portion of the fourth claim listed above.

In response to petitioner's claims, respondent denies that petitioner's rights were violated. Respondent also asserts that California prisoners have no liberty interest in parole and that if they do, the only due process protections available are a right to be heard and a right to be informed of the basis for the denial – that is, respondent contends there is no due process right to have the result supported by sufficient evidence. Because these contentions go to whether petitioner has any due process rights at all in connection with parole, and if he does, what those rights are, they will be addressed first.

**A. Respondent's Contentions**

**1. Liberty Interest**

Respondent contends that California law does not create a liberty interest in parole. However, the Ninth Circuit has held that it does. See *Sass v. California Bd. of Prison Terms*, 461 F.3d 1123, 1127-28 (9th Cir. 2006). Respondent says that this issue is raised only to preserve it, because at the time the answer was filed a petition for rehearing en banc was pending in *Sass*; that petition has now been denied. See *Sass*, case no. 05-16455 (order Feb. 13, 2007).

Respondent's argument as to liberty interest is without merit.

**2. Due-Process Protections**

Respondent also contends that even if California prisoners do have a liberty interest in parole, the due process protections to which they are entitled by clearly-established

Supreme Court authority are limited to notice, an opportunity to be heard, and a statement of reasons for denial. That is, she contends there is no due process right to have the decision supported by "some evidence." This position, however, has been rejected by the Ninth Circuit, which has held that the Supreme Court has clearly established that a parole board's decision deprives a prisoner of due process if the board's decision is not supported by "some evidence in the record", or is "otherwise arbitrary." *Irons v. Carey*, 479 F.3d 658, 662 (9th Cir. 2007) (applying "some evidence" standard used for disciplinary hearings as outlined in *Superintendent v. Hill*, 472 U.S. 445-455 (1985)); *McQuillion*, 306 F.3d at 904 (same). The evidence underlying the Board's decision must also have "some indicia of reliability." *McQuillion*, 306 F.3d at 904; *Biggs*, 334 F.3d at 915. The some evidence standard identified in *Hill* is clearly established federal law in the parole context for purposes of § 2254(d). See *Sass*, 461 F.3d at 1128-1129.

**B. Petitioner's Claims**

**1. "Hate" as Motive**

Petitioner's first claim challenges the Board's citing as a factor for denying parole the apparent "hate" motive for petitioner's commitment offenses. The record shows that the Board considered petitioner's motive for the crimes as a factor tending to show unsuitability for parole. Resp. Ex. 4 at 65-66. The Board reviewed the alleged facts of the crimes - he shot each victim, all black males, after observing each in mixed-race relationships. *Id.* at 26. His version of the events describe his "history of negative experiences with Blacks, which created hostility" and his finding "the victims' behavior unacceptable." *Id.* at 27. The Board found that "the motive for this crime was inexplicable in that the motive was based on hate" and on petitioner's attitude towards mixed-race relationships. *Id.* at 66.

Petitioner contends that by taking into account the fact that racial hatred was a motive for his offense, the Board violated his rights under the Ex Post Facto Clause of the Constitution because California's "hate crime" statute did not come into effect until 1992, long after his offense. The short answer, of course, is that this claim fails because the hate crime statute has nothing to do with the denial of parole. As the Board did not violate

petitioner's constitutional rights in this respect, the state court's rejections of the claim were not contrary to, or an unreasonable application of, clearly-established United States Supreme Court authority. Accordingly, petitioner is not entitled to habeas relief on this claim.

## 2. "Some Evidence" Claim

In his second claim petitioner makes several arguments. As is the case with several other claims, what petitioner sets forth under the heading "claim two" of the claim seems to concern matters completely different from the allegations under the "supporting facts" of claim two. Petition at 8a-8b. The court has attempted to address all of his arguments, regardless of where petitioner has placed them.

Petitioner's claim under the heading portion of "claim two" is that the Board violated his ex post facto rights by applying to him standards applicable under the Determinate Sentencing Law, when he had been convicted under the older Indeterminate Sentencing Law. *Id.* at 8a. This claim was dismissed in the court's order partially granting respondent's motion to dismiss.

In the "supporting facts" portion of this claim petitioner appears to be presenting one or more new arguments, but it is difficult to sort out exactly what they might be. Petitioner argues that the evidence of his recent improvements in prison should have been considered a psychological factor. Petition at 8b. As best the court can tell, his position is that when the Board noted that his improvements in "self-help" and therapy were only "recent," Resp. Ex. 3 at 70, this was incorrect because his 2000 psychological report said that he showed no signs of mental disorders, *id.* at 56-57. If petitioner is trying to argue that the Board was bound by the earlier psychological report, that is no basis for a constitutional claim.

Petitioner also appears to argue that there was not some evidence to support the denial of parole because all "psychiatric factors" favored granting parole. Pet. at 8b. The recent California Supreme Court of *In re Lawrence*, 44 Cal.4th 1181 (Cal. 2008), clarified what California law requires the Board to find in order to deny parole: That the prisoner is a

1 current threat to public safety, not that some of the specific factors in the regulations have  
2 or have not been established. *Id.* at 1212. This means that the "some evidence" test is  
3 whether there is "some evidence" that the prisoner is a threat, not whether there is "some  
4 evidence" to support particular secondary findings of the Board, for instance that the  
5 prisoner needs more time for rehabilitation. See *Irons v. Carey*, 505 F.3d 846, 850 (9th Cir.  
6 2007) (when assessing whether a state parole board's suitability determination was  
7 supported by "some evidence," the court's analysis is framed by the statutes and  
8 regulations governing parole suitability determinations in the relevant state).  
9 Consequently, even if there were a lack of evidence of psychiatric reasons that  
10 petitioner was not suitable for parole, this would not render such denial  
11 unconstitutional provided that there was "some evidence" that petitioner would pose  
12 a threat to public safety if released.

13 In ascertaining whether the some evidence standard is met, "the relevant question is  
14 whether there is any evidence in the record that could support the conclusion reached by  
15 the disciplinary board." *Hill*, 472 U.S. at 455; *Sass*, 461 F.3d at 1128. The some evidence  
16 standard is minimal, and assures that "the record is not so devoid of evidence that the  
17 findings of the disciplinary board were without support or otherwise arbitrary." *Sass*, 461  
18 F.3d at 1129 (quoting *Hill*, 472 U.S. at 457).

19 The California Superior Court found that the Board "did not err it its determination  
20 that [p]etitioner is not suitable for parole at this time." Resp. ex. 4 at 3. The court found  
21 that the Board had "good reason to conclude that the [p]etitioner would pose an  
22 unreasonable risk of danger to society or a threat to public safety if released from prison."  
23 *Id.*; see Cal. Code Regs. tit. 15, § 2402(a).

24 The record of the parole hearing supports the state court's opinion. The record  
25 shows that the Board reviewed petitioner's lengthy criminal history, Resp. Ex. 3 at 29, and  
26 three violence-related disciplinary violations while incarcerated, including a threatening  
27 letter he sent to the district attorney's office in 1995, *id.* at 47-50, 67. The Board heard a  
28 statement from the Los Angeles County district attorney arguing that it had only been eight



1 years since his last violent disciplinary violation, compared to a twenty-year history of  
2 criminality. *Id.* at 52. The Board reviewed reports indicating that since his last hearing, he  
3 remained disciplinary-free and his behavior had been excellent. *Id.* at 39. The Board also  
4 reviewed the self-help programs he had completed, including Narcotics Anonymous and an  
5 "Alternatives to Violence" program. *Id.* at 38-39. The Board noted that "[petitioner] should  
6 be commended for a number of things that he has accomplished," but found that "the  
7 [petitioner's] gains are recent, he must demonstrate an ability to maintain those gains over  
8 an extended period of time . . . these positive aspects of his behavior do not outweigh the  
9 factors of unsuitability." *Id.* at 70-71.

10 The evidence recited above, in particular the nature of the offense, the violence in  
11 prison, the threat to the district attorneys office, and the lengthy period of petitioner's  
12 criminal behavior, constitutes the "some evidence" required by due process in support of  
13 the Board's determination that petitioner was unsuitable for parole. *See Hill*, 472 U.S. at  
14 455; *Sass*, 461 F.3d at 1128. Consequently, the state court's opinion was neither contrary  
15 to nor an unreasonable application of clearly established federal law, and petitioner was not  
16 entitled to habeas relief on this claim.

### 17 3. Erroneous Information Claim

18 Petitioner contends that his due process rights were violated by the Board's  
19 consideration of factually erroneous information when it found him unsuitable for parole.  
20 *Pet.* at 8b. He contends that the Board considered the fact that in his commitment offense  
21 he wounded two victims, but he alleges that neither person was in fact "struck by a pellet"  
22 or wounded. *Id.*

23 Petitioner fails to provide any evidence to support his claim that two of the victims  
24 were not wounded. He claims that police reports dated December 12, 1973, and March 24,  
25 1974, indicate that neither victim was wounded, *id.*, but does not provide evidence of such  
26 reports nor does he point to any indication of such reports in the record. To the contrary,  
27 the record shows that the Board reviewed the probation officer's report which described the  
28 three alleged shootings. *Resp. ex. 3* at 26. The Board also reviewed petitioner's own



1 account of the crime from 1990 in which he stated that he agreed with the official version of  
2 the offense that indicated that the two victims were wounded. *Id.* The Board then gave  
3 petitioner a chance to add to the official account, but he stated that it was "essentially  
4 correct," and added information about his improved relationships with African Americans.  
5 *Id.* at 27.

6 Consequently, there is no basis for finding that the Board relied on false or  
7 erroneous facts in reaching its decision. He is not entitled to federal habeas relief on this  
8 claim.

#### 9 4. "Unpredictable Threat" Claim

10 Petitioner contends that his due process rights were violated by the Board's  
11 consideration of the correctional counselor's assessment that he posed an "unpredictably  
12 high" degree of threat to the public when it found him unsuitable for parole. Pet. at 8c.  
13 Petitioner states that when asked why she used the word "unpredictably," the counselor  
14 explained that "it's impossible to predict if a person is going to re-offend or not." *Id.*  
15 Petitioner also contends that her explanation violated the California Department of  
16 Corrections and Rehabilitation Department Operations Manual guidelines and the public  
17 trust, and rendered the Board's hearing arbitrary. *Id.*

18 First, petitioner fails to provide evidence of the explanation he attributes to the  
19 counselor. He does not point to the statement in the record and independent examination  
20 of the record reveals her assessment, Resp. ex. 3 at 67, but not the explanation petitioner  
21 attributes to her.

22 Second, even if the counselor gave such an explanation, there is no due process  
23 guarantee to an accurate correctional counselor's statement. In parole determinations, due  
24 process requires an opportunity to be heard and an explanation for the decision,  
25 *Greenholtz*, 442 U.S. at 16, and some evidence, with an indicia of reliability, supporting the  
26 decision. See *Irons*, 479 F.3d at 662; *Sass*, 461 F.3d at 1128-29; *Biggs*, 334 F.3d at 915.  
27 Relevant in this inquiry "is whether the prisoner was afforded an opportunity to appear  
28 before, and present evidence to, the [B]oard." *Morales v. California Dep't of Corrections*,

1 16 F.3d 1001, 1005 (9th Cir. 1994), *rev'd on other grounds*, 514 U.S. 449 (1995).


2 The record shows that petitioner received all the due process required under clearly  
3 established federal law. He was given the opportunity to make statements, Resp. ex. 3 at  
4 21-24, 46, and present letters written on his behalf, *id.* at 44. He was given an explanation  
5 for the Board's denial, *id.* at 65-68. Further, as described above, the record shows that, in  
6 finding him unsuitable for parole, the Board relied on factors supported by some evidence  
7 with an indicia of reliability, including the circumstances of the commitment offense, an  
8 unstable social history of alcohol and drug use, his prior criminal history, three violence-  
9 related disciplinary violations while incarcerated, his "general" parole plans, and the need  
10 for him to demonstrate his gains over a longer period of time. *Id.* at 68-71; see Cal. Code  
11 Regs. tit. 15, § 2402(c)-(d). Petitioner received all the process that was constitutionally  
12 required, and therefore he is not entitled to federal habeas relief on this claim.

13 **CONCLUSION**

14 The petition for a writ of habeas corpus is **DENIED**. The clerk shall close the file.

15 **IT IS SO ORDERED.**

16 Dated: March 2, 2009.

  
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PHYLLIS J. HAMILTON  
United States District Judge

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